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IF IT'S NOT BROKE, DON'T FIX IT: IGNORING CRITICISMS OF SUPREME COURT RECUSALS

INTRODUCTION

An impartial decision-maker is essential to the American notion of justice. The Declaration of Independence listed the lack of judicial independence as one of the American people's primary grievances.¹ Since 1789, Supreme Court Justices have taken an oath to "administer justice without respect to persons, and do equal right to the poor and rich, and [to] faithfully and impartially discharge and perform all [their] duties"² Courthouses around the country display a blindfolded Lady Justice to represent that justice is "even-handed and equally administered to all, irrespective of any and all considerations."³

Recusal is one tool used to ensure that Supreme Court Justices are the impartial decision-makers that litigants and the public expect. Public opinion matters because the Supreme Court is unlike the other branches of government, which derive authority from the electoral process.⁴ The Court's only authority is its institutional authority, which depends on its ability to command the respect and trust of the public.⁵ The public will only respect and trust Supreme Court opinions if "the American people believe [the Justices] to be impartial and above any particular political or financial interests."⁶ If the public believes that the Justices have a personal or political agenda, then the public will be less

1. "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. . . . He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." THE DECLARATION OF INDEPENDENCE paras. 2, 11 (U.S. 1776).

2. 28 U.S.C. § 453 (2006).

3. *Koppelman v. C.I.R.*, 202 F.2d 955, 956 (3d. Cir. 1953).

4. Jeffrey Rosen, Larry Kramer, Sandra Day O'Connor, Stephen Breyer, Does the Supreme Court Follow the People? at 14 (Aspen Idea Festival 2011) [hereinafter Does the Supreme Court Follow the People?] (transcript available at http://www.aifestival.org/sites/default/files/transcripts/AIF11_050_does_SCOTUS_follow_public.pdf).

5. *Id.*

6. Letter from Rep. Christopher Murphy et al. to Hon. Lamar Smith, Chairman, H. Comm. on the Judiciary (Sept. 9, 2011) [hereinafter Letter from Rep. Christopher Murphy], in Eric Lichtblau, *Democrats Seek to Impose Tougher Supreme Court Ethics*, THE CAUCUS BLOG (Sept. 8, 2011, 6:43 PM), <http://thecaucus.blogs.nytimes.com/2011/09/08/democrats-seek-to-impose-tougher-supreme-court-ethics/>.

willing to accept the Court's decisions and the integrity and legitimacy of the Court will be harmed.⁷

The Supreme Court recusal process seems to become part of mainstream media when the line between justice and politics becomes blurred. For example, in 2004, Vice President Dick Cheney was named in his official capacity as the Vice President of the United States and Chairman of the Cheney Energy Task Force as a defendant in a case before the Supreme Court.⁸ About three weeks after the Court granted certiorari, Justice Antonin Scalia and Cheney went on a duck-hunting trip together.⁹ A journalist at the L.A. Times broke the news about the trip,¹⁰ and news outlets across the nation picked up the story.¹¹ Details about the trip's length, travel arrangements, lodging, financing, and other attendees leaked out bit by bit.¹² Political cartoons and late-night monologues followed.¹³ Senators Patrick Leahy and Joseph Lieberman wrote to Chief Justice William Rehnquist asking about the High Court's policies on conflict of interest: "When a sitting judge, poised to hear a case involving a particular litigant, goes on vacation with that litigant, reasonable people will question whether that judge can be a fair and impartial adjudicator of that man's case or his opponent's claims."¹⁴ By the time a motion asking Justice Scalia to recuse himself was filed, twenty of the thirty largest newspapers in America had explicitly called on Justice Scalia to disqualify himself.¹⁵ Not a single newspaper had argued against disqualification.¹⁶ "[T]he American public . . . ha[d] unanimously concluded that there is an appearance of favoritism . . . which mandates recusal . . ."¹⁷

7. Nina Totenberg, *Bill Puts Ethics Spotlight on Supreme Court Justices*, NPR (Aug. 17, 2011), <http://www.npr.org/2011/08/17/139646573/bill-puts-ethics-spotlight-on-supreme-court-justices>.

8. *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 918 (2004).

9. *Mot. to Recuse at 2, Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913 (2004) (No. 03-475).

10. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 572-73 (2005) (citing David Savage, *Trip with Cheney Puts Ethics Spotlight on Scalia*, L.A. TIMES, Jan. 17, 2004, at A1).

11. Totenberg, *supra* note 7.

12. Frost, *supra* note 10, at 577.

13. *Mot. to Recuse*, *supra* note 9, at 5-6.

14. Frost, *supra* note 10, at 574 (quoting Letter from Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary, and Sen. Joseph I. Lieberman, Ranking Member, S. Comm. on Governmental Affairs, to The Hon. William H. Rehnquist, Chief Justice, Supreme Court of the United States (Jan. 22, 2004)). Chief Justice Rehnquist was not amused by their inquiry. Frost, *supra* note 10, at 574. Rehnquist responded to their letter by chastising the Senators for criticizing the actions of a Justice while the case was pending, instead of waiting until the case had been decided. *Id.*

15. *Mot. to Recuse*, *supra* note 9, at 3.

16. *Id.*

17. *Id.* at 3-4.

Several weeks later, Justice Scalia issued a twenty-one-page memorandum defending his decision not to recuse.¹⁸

Debate over Supreme Court recusals ignited anew surrounding the Obama administration's health care reform law, the Patient Protection and Affordable Care Act ("Affordable Care Act"). Health care has been a particularly polarizing issue in American politics in recent years.¹⁹ Those on all sides of the dispute expected the new law to ultimately reach the Supreme Court.²⁰ It was inevitable that the Justices were going to be "drawn into the political fray."²¹ And with the Supreme Court's grant of certiorari to hear the constitutional challenges to the law, calls for the self-recusal of Justice Elena Kagan and Justice Clarence Thomas intensified.²²

Justice Kagan was urged to recuse herself because of her previous position as U.S. Solicitor General, the federal government's top lawyer at the Supreme Court.²³ Kagan was notified by the White House in March 2010, just before the Affordable Care Act was passed, that she was under consideration to be named to the Supreme Court.²⁴ Upon learning this, Kagan stated she then abstained from discussing the inevitable legal challenges to the health care reform law with the White House and the Justice Department.²⁵ She said she attended only one meeting where the litigation was briefly mentioned and none where the litigation was substantively discussed.²⁶ Kagan also said she was never asked her opinion about the constitutionality of the Affordable Care Act, or the underlying legal issues in the litigation.²⁷ Nor had she ever reviewed government documents.²⁸ Additionally, Attorney General Eric Holder, Jr. said lawyers went out of their way to keep from involving Kagan in the discussions.²⁹ The political right, however, questioned the effectiveness of the

18. *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913 (2004).

19. Lyle Denniston, *Analysis: Health Care and Recusal Politics*, SCOTUSBLOG (Nov. 28, 2011, 12:25 AM), <http://www.scotusblog.com/2011/11/analysis-health-care-and-recusal-politics/>.

20. *Id.*

21. *Id.*

22. The Supreme Court heard oral arguments on March 26–28, 2011. Lyle Denniston, *Court Sets 5½-Hour Hearing on Health Care*, SCOTUSBLOG (Nov. 14, 2011, 10:49 AM), <http://www.scotusblog.com/2011/11/court-sets-5-12-hour-hearing-on-health-care/>.

23. Robert Barnes, *Health-Care Case Brings Fight over Which Supreme Court Justices Should Decide It*, WASH. POST (Nov. 27, 2011), http://www.washingtonpost.com/politics/health-care-case-brings-fight-over-which-supreme-court-justices-should-decide-it/2011/11/22/gIQAwwRwb2N_story.html.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Barnes, *supra* note 23.

“Chinese wall.”³⁰ Emails released following a Freedom of Information Act request show Kagan wanted the Solicitor General’s office involved in strategy decisions regarding the health care reform law and also show her personal enthusiasm for the law.³¹

Justice Thomas was urged to recuse himself as well. His wife, Virginia Thomas, was an outspoken opponent of the Affordable Care Act; before she stepped down as the CEO of Liberty Central, its website characterized the law as “tyranny” and demanded the repeal of “ObamaCare.”³² Virginia Thomas received financial contributions for her advocacy from well-known conservative donors with whom Justice Thomas has also been associated.³³ Justice Thomas had also spoken at events sponsored by organizations opposed to the Affordable Care Act.³⁴ Combined, these reasons led critics to question whether Justice Thomas could maintain the appearance of impartiality when the Affordable Care Act comes before the Court.³⁵

The demands for Justices Kagan and Thomas to recuse themselves came against a backdrop of intense criticism of Supreme Court ethics by members of Congress, the legal community, and advocacy groups.³⁶ Some members of Congress feared the public’s faith in the judicial system and the integrity of the country’s highest court had been eroded “after several recent questionable actions by some of its members” and “alarming reports” of Justices fundraising for political organizations.³⁷ In March 2011, Representative Christopher Murphy from Connecticut sponsored “The Supreme Court Transparency and Disclosure Act of 2011,” (the “Murphy Bill”) which seeks, in part, to amend the recusal process.³⁸ The bill calls for Justices to publicly disclose their reasons for disqualifying themselves *sua sponte* or in response to a party’s motion, and also their reasons for refusing recusal and instead remaining on a case.³⁹ The bill also seeks the creation of a process to further review any such refusals to recuse.⁴⁰

30. *Id.*

31. *Id.*

32. Steven Lubet, *Let the Justices Be the Judge*, CHI. TRIB. (Oct. 27, 2010), http://articles.Chicagotribune.com/2010-10-27/news/ct-oped-1027-activism-20101027_1_health-care-justice-elena-kagan-supreme-court-justices.

33. Denniston, *supra* note 19.

34. *Id.*

35. *Id.*

36. Lyle Denniston, *A Defense of Justices’ Ethics*, SCOTUSBLOG (Dec. 31, 2010, 6:01 PM), <http://www.scotusblog.com/2011/12/a-defense-of-justices-ethics/>.

37. Letter from Rep. Christopher Murphy, *supra* note 6.

38. H.R. 862, 112th Cong. § 3(a) (2011).

39. *Id.*

40. *Id.* at § 3(b).

Similarly, a group of over one hundred law professors from around the United States sent a letter to the Senate and House Judiciary Committees in March 2011 calling for transparent, reviewable Supreme Court recusal decisions.⁴¹ The professors criticized the Supreme Court's non-reviewable recusal decisions, which they claim "turn solely on the silent opinion of the challenged justice," for eroding public confidence in the Court and harming the integrity and legitimacy of the Supreme Court.⁴² The professors pointed to Lord Coke's seventeenth century articulation that "no man may be a judge in his own case," and lamented that "inexplicably we still allow Supreme Court justices to be the sole judge of themselves on recusal issues."⁴³

Both the demands for Justices Kagan and Thomas to recuse themselves and the proposals for revising the recusal statute are misguided, however. Without considering historical evidence or current facts, critics have bought into the media frenzy, indulged doubts about the integrity of Supreme Court Justices,⁴⁴ and ignored assurances from parties who are actually informed about the mechanics of the Court and recusal.

Part I of this paper discusses the history of the federal recusal statute. Part II describes the criticisms of the recusal statute and proposed revisions and explains why this is a situation in which the cures are worse than the disease. Finally, Part III presents the argument that current criticisms of the recusal process are misguided and no revision of the process is necessary.

I. HISTORY OF THE FEDERAL RECUSAL STATUTE

Under English common law, there was no recusal for bias.⁴⁵ It was understood that part of a judge's job was to set aside personal interests and biases, "to rise above personal considerations," and to decide the case on the merits.⁴⁶ In America, Congress has set the standard for judicial recusal since 1792. The first federal recusal statute required a judge to remove himself from a case when he was "concerned in interest, or ha[d] been of counsel for either party."⁴⁷ However, similar to English common law, the statute did not prohibit

41. Letter from Mark N. Anderson et al. to Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary (Mar. 17, 2011) [hereinafter "Letter from Law Professors"], *available at* http://www.afj.org/judicial_ethics_sign_on_letter.pdf.

42. *Id.*

43. *Id.*

44. *See supra* notes 10-13, 15-17 and accompanying text.

45. *See* Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1096 (2004) (contrasting with U.S. recusal statutes).

46. *Id.*

47. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278 ("That in all suits and actions in any district court of the United states, in which it shall appear that the judge of such court is, any ways, concerned in interest, or has been of counsel for either party, it shall be the duty of such judge on application of either party, to cause the fact to be entered on the minutes of the court, and also to

judges from hearing cases in which they might be biased against, or in favor of, one of the parties.⁴⁸ For example, *Marbury v. Madison*, “our legal culture’s most revered judicial decision,” might have been resolved differently, and the Constitutional Law experience of every law student changed, had the recusal statute contained more than two specific grounds for judicial qualification.⁴⁹ William Marbury had been appointed by President John Adams to serve as Justice of the Peace in the District of Columbia.⁵⁰ After President Adams signed Marbury’s commission, Secretary of State John Marshall sealed it.⁵¹ But Marbury’s commission was never delivered because Marshall left it behind in his desk as he departed the Secretary of State’s office to become Chief Justice of the Supreme Court,⁵² and Marbury petitioned the Supreme Court to force the new Secretary of State to deliver the commission.⁵³ Chief Justice Marshall not only caused the litigation, he authored the opinion and determined its outcome.⁵⁴

Recusal for bias became part of the statute in 1821 when the recusal standard was expanded to require a judge to recuse himself when, in his opinion, he had a relation or connection to a party that would make it improper to sit.⁵⁵ In 1911, Congress broadened the recusal statute again and required a

order an authenticated copy thereof, with all the proceedings in such suit or action, to be forthwith certified to the next circuit court of the district, which circuit court shall, thereupon, take cognizance thereof, in the like manner, as if it had been originally commenced in that court, and shall proceed to hear and determine the same accordingly.”).

48. *Id.*

49. *Del Vecchio v. Ill. Dept. of Corr.*, 31 F.3d 1363, 1390 (7th Cir. 1994).

50. *Marbury v. Madison*, 5 U.S. 137, 137–38 (1803).

51. *Id.* at 138.

52. *Del Vecchio*, 31 F.3d at 1390.

53. *Marbury*, 5 U.S. at 137–38.

54. *Del Vecchio*, 31 F.3d at 1390.

55. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643 (“That in all suits and actions in any district court of the United states, in which it shall appear that the judge of such court is, any ways, concerned in interest, or has been of counsel for either party, or is so related to, or connected with, either party as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party, to cause the fact to be entered on the records of the court; and, also, an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the next circuit court of the district; and if there be no circuit court in such district, to the next circuit court in the state; and if there be no circuit court in such state, to the most convenient circuit court in an adjacent state; which circuit court shall, upon such record being filed with the clerk thereof, take cognizance thereof, in the like manner as if such suit or action had been originally commenced in that court, and shall proceed to hear and determine the same accordingly; and the jurisdiction of such circuit court shall extend to all such cases so removed, as were cognisable in the district court from which the same was removed.”).

judge to recuse himself when he was a material witness for either party.⁵⁶ In 1948, the recusal statute was codified as 28 U.S.C. § 455,⁵⁷ and Congress made several more changes. First, the statute was amended to apply to “[a]ny justice of judge of the United States,”⁵⁸ while previous versions of the statute applied only to district court judges.⁵⁹ Supreme Court recusals were now covered by the statute. Second, Congress added that it was improper for a judge to sit on a case not only when the judge had a relation or connection to a party, but also a relation or connection to a party’s attorney.⁶⁰ Third, it was no longer required that a party seek the judge’s disqualification before the judge had to remove himself; judges were now under an obligation to recuse themselves when they knew of their own partiality.⁶¹ Finally, Congress uncharacteristically narrowed the recusal statute by qualifying that a judge’s interest in a case must be “substantial” in order to warrant recusal.⁶²

Generally speaking, by 1948, the recusal statute required nothing more than it had in 1821—a judge was prohibited from presiding when he had an interest in the case or a relationship to a party. The statute was simply not as effective as Congress had intended.⁶³ The recusal determination was entirely subjective—a judge personally decided, “in his opinion,” whether an interest or relationship made it improper to sit.⁶⁴ The statute was “indefinite and ambiguous” and provided little guidance to judges making a recusal

56. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1087, 1090 (“Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen.”).

57. FED. JUD. CTR., *RECUSAL: ANALYSIS OF CASELAW UNDER 28 U.S.C. §§ 455 & 144* at 2 (2002) (quoting Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908) (“Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.”).

58. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908 (codified as 28 U.S.C. § 455) (amended 1974).

59. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1090; Act of Mar. 3, 1821, ch. 51, 3 Stat. 643.

60. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908 (amended 1974).

61. *Id.*

62. *Id.*

63. See H.R. REP. NO. 93-1453 at 1–2 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6352.

64. FED. JUD. CTR., *supra* note 47, at 2.

determination.⁶⁵ Judges were able to narrowly construe the mandatory grounds for disqualification to limit the reach of the recusal statute.⁶⁶ Judges also created a “duty to sit” and would resolve close disqualification issues against recusal based on the obligation to decide the cases to which judges were assigned.⁶⁷ Congress felt that § 455 weakened the public’s confidence in the judicial system.⁶⁸

In 1974, Congress “made massive changes” to § 455 to broaden and clarify the grounds for judicial disqualification.⁶⁹ The one-paragraph statute was transformed into a lengthy statute with multiple sections, subsections, and subsections to the subsections.⁷⁰

Subsection (a) was “an entirely new ‘catchall’ provision” incorporated into § 455⁷¹ intended “to promote public confidence in the integrity of the judicial process.”⁷² It required recusal when the justice’s “impartiality might reasonably be questioned.”⁷³ Subsection (a) replaced the subjective standard of the 1948 recusal statute and required judges to evaluate their interests, relationships, biases, and prejudices on an objective basis “from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.”⁷⁴ “The decision whether a judge’s impartiality can ‘reasonably be questioned’ is to be made in light of the facts as they existed, and not as they were surmised or reported.”⁷⁵ What matters under § 455(a) is “not the reality of bias or prejudice but its appearance.”⁷⁶

The language of subsection (a) also had the effect of abolishing the duty to sit⁷⁷ which judges relied on to deny requests for recusal in “all but the most

65. H.R. REP. NO. 93-1453 at 2 (“These statutory and ethical provisions proved to be not only indefinite and ambiguous, but also, in certain situations, conflicting. The uncertainty of who was a ‘near relative’ or of when the judge was ‘so related’ caused problems in application of both the statutory and the ethical standards. While the Canon required disqualification for involvement of ‘his personal interests’, the statute required such action only when it was ‘a substantial interest.’”).

66. Frost, *supra* note 10, at 541 (citing Randal J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 239 (1978)).

67. FED. JUD. CTR., *supra* note 47, at 2.

68. H.R. REP. NO. 93-1453 at 2.

69. *Liteky v. United States*, 510 U.S. 540, 546 (1994).

70. See Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609.

71. *Liteky*, 510 U.S. at 548.

72. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859–60 (1988).

73. 28 U.S.C. § 455(a) (2006).

74. *Id.*; *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 924 (2004).

75. *Cheney*, 541 U.S. at 914.

76. *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000).

77. H.R. REP. NO. 93-1453 at 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355.

blatant circumstances.”⁷⁸ The duty to sit was replaced by a “presumption of disqualification.”⁷⁹ When there was a reasonable factual basis for doubting a judge’s impartiality, the judge was to disqualify himself.⁸⁰ Congress made clear that close cases were to be resolved in favor of disqualification.⁸¹ The House Report to the Judiciary noted it was unanimously agreed that eliminating the duty to sit “would enhance public confidence in the impartiality of the judicial system.”⁸²

Subsection (b) of the amended statute focused on the “interest” and “relationship” elements of the 1948 recusal statute and provided specific, objective instances in which recusal was necessary.⁸³ Congress sought to eliminate the ambiguous and uncertain language of the 1948 statute to help judges avoid criticism for failure to disqualify themselves.⁸⁴ There are now five specific situations in which recusal is mandatory and cannot be waived. A judge must recuse for personal bias or prejudice concerning a party or personal knowledge of the facts.⁸⁵ Recusal is also required when the judge, or a lawyer with whom the judge previously practiced law, has served as a lawyer or material witness in the matter in controversy.⁸⁶ The judge is required to recuse when they or their family has a financial interest in the proceeding.⁸⁷ Recusal is also required when the judge or their family is a party, a lawyer, or a witness, or has some other substantial interest in the proceeding.⁸⁸ Finally, recusal is required when the judge was previously employed by the government and participated as a judge, counsel, advisor, or material witness in the proceeding, or expressed an opinion concerning the merits of the proceeding.⁸⁹

78. Jeffrey W. Stempel, *Chief William’s Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 864 (2009) (quoting RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 604–05 (2d ed. 2007)).

79. Stempel, *supra* note 78, at 864.

80. H.R. REP. NO. 93-1453 at 4.

81. Stempel, *supra* note 78, at 866.

82. H.R. REP. NO. 93-1453 at 4. However, Supreme Court Justices in particular continue to evoke the “duty to sit.” *See* *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 915–16 (2004).; CHIEF JUSTICE JOHN ROBERTS, JR., 2011 YEAR END REPORT ON THE FEDERAL JUDICIARY 9 (2012).

83. *Liteky v. United States*, 510 U.S. 540, 548 (1994); FED. JUD. CTR., *supra* note 47, at 5.

84. H.R. REP. NO. 93-1453 at 1–2.

85. 28 U.S.C. § 455(b)(1) (2006); FED. JUD. CTR., *supra* note 47, at 6.

86. 28 U.S.C. § 455(b)(2).

87. 28 U.S.C. § 455(b)(3).

88. 28 U.S.C. § 455(b)(4).

89. 28 U.S.C. § 455(b)(5).

II. CRITICISMS OF THE RECUSAL PROCESS, POTENTIAL SOLUTIONS, AND PROBLEMS WITH THE POTENTIAL SOLUTIONS

For over 200 years, Congress has tinkered with the substantive aspect of the recusal standard and the grounds which demand recusal.⁹⁰ Current criticisms, however, take aim at the procedural aspects of the recusal standard and the lack of basic procedural elements. Under the current recusal statute, § 455, recusal is an “ad hoc and informal process.”⁹¹ Decisions are not transparent or reviewable.⁹² “[W]e are just left believing the word of the [J]ustices.”⁹³ The recusal process is missing basic procedural elements typically viewed as indispensable to democratic adjudication.⁹⁴ This paper focuses on two of them: the lack of a neutral decision-maker and the lack of a written explanation for decisions.⁹⁵

A. *Lack of a Neutral Decision-Maker*

One point of general agreement in the justice system is that “no man may be a judge in his own case.”⁹⁶ Yet at the Supreme Court the decision to recuse has always rested with each individual Justice, and there is no process available to review that decision.⁹⁷ Scholars have criticized the recusal practice,⁹⁸ the media has questioned the wisdom of it,⁹⁹ and the Court itself has even expressed skepticism that “the sole trier of fact is the one accused of bias.”¹⁰⁰ Critics argue that leaving the recusal decision wholly up to the very Justice being asked to disqualify him or herself is problematic because it is unrealistic to expect anyone to be able to candidly assess the extent of their

90. Frost, *supra* note 10, at 533–34. Professor Frost argues that it has never been effective to alter the substance of the recusal standard because each time Congress has broadened the recusal standard, it has been narrowed as the members of the judiciary apply it to themselves. *Id.* at 534. “The very self-dealing that makes recusal necessary in the first place has operated to prevent disqualification statutes from being employed as fully and broadly as Congress intended.” *Id.*

91. *Id.* at 536.

92. Letter from Law Professors, *supra* note 41.

93. Totenberg, *supra* note 7.

94. Frost, *supra* note 10, at 535–36.

95. For procedural elements not discussed by this paper, see Frost, *supra* note 10, at 557–65.

96. Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 592–93 (1987) (quoting Dr. Bonham’s Case, (1610) 8 Co. Rep. 114a (C.P.) 118a (quoting Lord Coke)).

97. Caprice L. Roberts, *The Fox Guarding the Henhouse? Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 109 (2004).

98. Timothy J. Goodson, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. REV. 181, 217 n.191 (2005).

99. See, e.g., Adam Liptak, *Odd Court Routine: Being the Judge of Whether to Be the Judge*, N.Y. TIMES, Nov. 15, 2010, available at <http://query.nytimes.com/gst/fullpage.html?res=950CE FDE153AF935A25752C1A9669D8B63>.

100. Caperton v. A.T. Massey Coal Co., 129 S.Ct. 2252, 2264 (2009).

own bias.¹⁰¹ Judge Richard Posner thinks it is especially problematic when it comes to Supreme Court Justices.¹⁰² “Cocooned in their marble palace, attended by sycophantic staff, and treated with extreme deference wherever they go, Supreme Court Justices are at risk of acquiring an exaggerated opinion of their ability and character.”¹⁰³ Judges are human and certainly make mistakes, and decisions to recuse are no exception.¹⁰⁴ But on the United States Supreme Court—the court of last resort, critics find the mistakes particularly troublesome because there is no recourse.¹⁰⁵

One of the more popular suggestions for reforming the recusal process is to make the Justices’ recusal decisions reviewable.¹⁰⁶ Some commentators have advocated allowing the Justice who is the target of the motion to recuse to continue to make the initial determination; if the Justice refuses to recuse, one or more of the remaining eight Justices should review the decision.¹⁰⁷ Similarly, the Murphy Bill¹⁰⁸ recommends that the Justices review each others’ refusals to recuse, and also proposes that retired Justices and/or federal district court, circuit court, and senior judges could review Supreme Court refusals to recuse.¹⁰⁹ Advocates of the review process believe that it will ensure the recusal decision is handled objectively from those in a better position to evaluate the arguments, and the decision will be more respected by the public.¹¹⁰

There are some problems, however, with the suggestion to make Supreme Court recusal decisions reviewable. To begin with, having lower court judges review a Supreme Court Justice’s decision is unworkable and potentially unconstitutional. Herman Schwartz, an American University law professor

101. *Examining the State of Judicial Recusals after Caperton v. A.T. Massey: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 22 (2009) [hereinafter *Hearing*] (statement of Charles G. Geyh, Assoc. Dean of Research, Prof. of Law, Ind. Univ.); see also Steven Lubet, *It Takes a Court*, 60 SYRACUSE L. REV. 221, 227 (2010) (noting the West Virginia judge in *Caperton* “overestimated his own objectivity while failing to realize how others would react to his decision.”).

102. RICHARD A. POSNER, *HOW JUDGES THINK* 306 (2008).

103. *Id.*

104. See *Caperton*, 129 S.Ct. at 2265 (2009).

105. Russell Wheeler, *Regulating Supreme Court Justices’ Ethics: “Cures Worse Than the Disease?”*, BROOKINGS INST. (Feb. 5, 2012), http://www.brookings.edu/opinions/2011/0321_justices_ethics_wheeler.aspx.

106. Lubet, *supra* note 101, at 228 (“When it comes to disqualification, it takes more than a single judge to render a fair decision. It takes a court.”); Roberts, *supra* note 97, at 171–73; Frost, *supra* note 10, at 584.

107. *Hearing*, *supra* note 101, at 22 (statement of Charles G. Geyh, Assoc. Dean of Research, Prof. of Law, Ind. Univ.); Roberts, *supra* note 97, at 169.

108. See Letter from Rep. Christopher Murphy, *supra* note 6.

109. H.R. 862, 112th Cong. § 3(b) (2011).

110. See, e.g., Roberts, *supra* note 97, at 171.

who signed the letter to Congress asking for mandatory and enforceable ethical rules for the Supreme Court,¹¹¹ called the Murphy Bill “clearly very flawed.”¹¹² He added that “no lower court judge would dare say [J]ustice so-and-so should have recused him or herself.”¹¹³ Additionally, the denial of a recusal motion is a judicial act, and Supreme Court judicial acts are not subject to appeal.¹¹⁴ Authorizing a party to “seek further review”¹¹⁵ of a Supreme Court Justice’s denial of a motion to recuse is the same thing as permitting an appeal, and it results in the creation of a court higher than the Supreme Court, which violates the Constitutional mandate of “one supreme Court.”¹¹⁶ “[E]stablishing any sort of supervisory body over the Supreme Court, even a supervisory body made of themselves, would fundamentally change the principle of judicial independence.”¹¹⁷

Another problem with having the Justices review each other’s recusal decisions is it could “make for awkward intra-Justice relations,”¹¹⁸ or even worse, destroy the collegiality of the Court.¹¹⁹ Justice Kagan has called the Supreme Court “an incredibly collegial and warm institution.”¹²⁰ Justice Ruth Bader Ginsburg told her law school classmates at their fifty-year reunion that the Supreme Court is “the most collegial place I have ever worked.”¹²¹ Collegiality at the Supreme Court goes beyond mutual understanding, respect, and working toward a common goal: the Justices are genuine friends. As Justice Ginsburg stated, “despite our sharp differences on certain issues . . . we remain good friends, people who respect each other and genuinely enjoy each other’s company.”¹²² The Justices make it a point to each lunch together every day they are at the Court.¹²³ Former Justice Sandra Day O’Connor and former Chief Justice William Rehnquist were friends for over fifty years and shared backyard barbecues and family vacations.¹²⁴ Justice Ginsburg and Justice

111. *See supra* notes 36–43 and accompanying text.

112. Totenberg, *supra* note 7.

113. *Id.*

114. Wheeler, *supra* note 105.

115. H.R. 862, 112th Cong. § 3(b) (2011).

116. *Id.*; Totenberg, *supra* note 7.

117. Totenberg, *supra* note 7.

118. Roberts, *supra* note 97, at 171.

119. *See supra* notes 115–16.

120. Andre Salvail, *Justice Kagan Speaks of Life on the Highest Court*, ASPEN TIMES (Aug. 3, 2011), <http://www.aspentimes.com/article/20110803/NEWS/110809970>.

121. Press Release, Columbia Law School, Disagreements at Supreme Court Confined to Opinions, Justice Ruth Bader Ginsburg ‘59 Says (June 20, 2009), http://www.law.columbia.edu/media_inquiries/news_events/2009/june2009/ginsburg.

122. Ruth Bader Ginsburg, *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1035 (2004).

123. *Id.* at 1034.

124. JEFFREY TOOBIN, *THE NINE* 3 (2007).

Scalia, along with their spouses, have spent every New Year's Eve together for over twenty years.¹²⁵ Justice Clarence Thomas is "universally adored" by his fellow Justices, and he and Justice Breyer often whisper, joke, and pass notes mocking one another during oral arguments.¹²⁶

Camaraderie and collegiality is highly valued at the Supreme Court,¹²⁷ where Justices are appointed for life, sit on cases with one another year after year,¹²⁸ "and seek to forge coalitions from term to term."¹²⁹ "[It is a] difficult task [to pass] upon the integrity of a fellow member of the bench,"¹³⁰ and the Justices will be hesitant to institute a review policy that might be viewed as disrespectful to one another. It is a long-established and time-honored tradition of the Court to allow Justices to individually decide whether or not to sit in any case.¹³¹ "Once a Justice has made a judgment, the other Justices are not going to publicly review that and say, 'You done wrong.'"¹³² Justices will be additionally hesitant to institute a review policy because no other federal court requires its members to sit in judgment of each other's recusal decisions.¹³³

A third problem with the creation of a formal review process is it is based on a fallacy that the Justices make recusal decisions without consulting anyone. In his 2011 Year-End Report on the Federal Judiciary, Chief Justice

125. Joan Biskupic, *Scalia, Ginsburg Strike a Balance*, USA TODAY (Dec. 25, 2007), http://www.usatoday.com/news/washington/2007-12-25-ginsburg-scalia_N.htm.

126. TOOBIN, *supra* note 124, at 103–04.

127. Justice Elena Kagan told the Aspen Institute, "I don't want to say that it's like you have an incentive to like each other. I think that you can live in an institution happily or you can live in an institution sadly. You can live with people respectfully or you can live with people without that. If you are going to be some place for a long time, boy, it makes you value collegiality." Carolyn Sackariason, *Kagan Reflects on First Year as Supreme Court Justice*, ASPEN DAILY NEWS (Aug. 3, 2011), <http://www.aspendailynews.com/section/home/148362>.

128. TOOBIN, *supra* note 124, at 23 ("The Court is defined more by continuity than by change.").

129. Frost, *supra* note 10, at 552.

130. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 n.12 (1988).

131. In his response to Senators Patrick Leahy and Joseph Lieberman's concerns about Justice Scalia sitting in the *Cheney* case, former Chief Justice Rehnquist said, "[T]here is no formal procedure for Court review of the decision of a Justice in an individual case. That is so because it has long been settled that each Justice must decide such a question for himself." David G. Savage, *High Court Won't Review Scalia's Recusal Decision*, L.A. TIMES (Jan. 27, 2004), <http://articles.latimes.com/2004/jan/27/nation/na-duck27>; Goodson, *supra* note 98, at 217 ("[T]he tradition of permitting each Justice to make his or her own decision on recusal is firmly entrenched in the Supreme Court. Even when parties have attempted to outmaneuver the practice by addressing their recusal motion to the full Court, the challenged Justice has solely decided the motion.").

132. Totenberg, *supra* note 7.

133. CHIEF JUSTICE ROBERTS, *supra* note 82, at 8.

Roberts reiterated what Justices have long been saying: they consult a wide variety of authority to resolve ethical issues, including issues of recusal.¹³⁴

First, and foremost, the Justices informally consult one another.¹³⁵ After Justice Thurgood Marshall's death, the Library of Congress opened his papers to the public, and it was revealed that in 1984, when Marshall decided he no longer wanted to recuse himself in cases in which the NAACP participated, he sent a memo to his fellow justices seeking their advice.¹³⁶ In 1993, the Justices consulted with one another regarding recusal when a relative's firm was involved in a case before the Court, and they issued a "Statement of Recusal Policy" detailing their views.¹³⁷ In 2000, Chief Justice Rehnquist gave a statement when he refused to recuse himself in *Microsoft* and stated he had "reviewed the relevant legal authorities and consulted with [his] colleagues."¹³⁸ Justice John Paul Stevens told the *Washington Post* that in 2003 he considered recusing himself in *Grutter v. Bollinger* because the dean of the University of Michigan law school was one of his former law clerks; however, in keeping with the *usual practice* on the Court, he consulted his colleagues, and they "unanimously and very firmly" told him not to recuse.¹³⁹ In 2004, Justice Ginsburg told the University of Connecticut School of Law, "[i]n the end it is a decision the individual Justice makes, but *always* with consultation among the rest of us."¹⁴⁰

Aside from consulting one another when making recusal decisions, the Justices also consult precedent and consider treatises, scholarly publications, and disciplinary decisions.¹⁴¹ The Justices seek advice from the Court's Legal Office.¹⁴² They present questions to the Judicial Conference's Committee on Codes of Conduct, which gives informal advice and written opinions to help judges comply with ethical principles.¹⁴³ The Justices also consult with law professors and ethics experts.¹⁴⁴

134. *Id.* at 5.

135. *Id.*

136. Ross E. Davies, *The Reluctant Recusants*, 10 GREEN BAG 2D 79, 81–82 (2006).

137. *Id.*

138. *Microsoft Corp. v. United States*, 530 U.S. 1301, 1301 (2000).

139. Davies, *supra* note 136, at 91.

140. Ginsburg, *supra* note 122, at 1039 (emphasis added).

141. CHIEF JUSTICE ROBERTS, *supra* note 82, at 5.

142. *Id.*

143. Judge Margaret McKeown of the Ninth Circuit spoke about the "Dear Abby Committee" to the House Committee on the Judiciary and explained they are an "ethics service center, and a sounding board to help judges try to comply with th[e] wide array of ethical principles." *Hearing*, *supra* note 101, at 7 (statement of Hon. M. Margaret McKeown, J., 9th Cir.). Judges can ask the Committee for informal advice and if that is not sufficient, judges can ask for a written opinion. *Id.* The Committee responds to over one thousand informal requests for advice each year and it issues over one hundred formal opinions. *Id.* Additionally, there are more than 80 publicly

Creating a process to review Supreme Court recusal decisions is a dangerous proposition because it is potentially unconstitutional and could change the collegial atmosphere of the Court. And if critics would only listen to the Justices, they would see that it is also unnecessary for the purpose of ensuring the decision is objective.

B. *Lack of a Written Explanation*

Courts gain legitimacy by explaining the reasoning for their decisions.¹⁴⁵ An explanation demonstrates that a judge's decision was deliberate, dispassionate, rational, and based on law, as opposed to being a gut reaction, arbitrary, or based on personal preferences.¹⁴⁶ Explanations also contribute to the creation of a body of caselaw, which is useful for standardizing decision-making, minimizing inconsistencies, and promoting predictability.¹⁴⁷

The Supreme Court's recusal practices are not well understood. When a litigant files a motion to recuse, the Justice's decision is memorialized as a one page, typically one-sentence, unpublished order directed to the parties.¹⁴⁸ When a Justice recuses sua sponte, a short statement appears in the case report that the Justice took no part in the decision being reported.¹⁴⁹ Justices rarely issue substantive opinions explaining their decision not to recuse,¹⁵⁰ and it is virtually unprecedented for a Justice to issue an opinion justifying recusal.¹⁵¹ As a result, Justices take a "hodgepodge of approaches",¹⁵² and recusals at the Supreme Court are "sometimes rigorous, sometimes idiosyncratic, and often

available advisory opinions, many which speak to recusal. *Id.* The situation was summarized by the following: "[J]udges want to do the right thing. They wouldn't call on us otherwise." *Id.* at 15.

144. *Considering the Role of Judges Under the Constitution of the United States Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of J. Stephen Breyer), available at <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=8bbe59e76fc0b6747b22c32c9e014187>.

145. See *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2263 (2009). ("To bring coherence to the [judicial] process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings.").

146. Frost, *supra* note 10, at 561–62.

147. *Id.* at 564.

148. Stempel, *supra* note 96, at 641.

149. *Id.* at 642.

150. Frost, *supra* note 10, at 569.

151. *Id.* at 570–71. *But see* *Pub. Utils. Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466–67 (1952) (Frankfurter, J.) (explaining the Justice recused himself because he was so strongly against the radio being played in public transportation. He said, "My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it.").

152. *The Diane Rehm Show: Conflict of Interest on the Supreme Court*, NPR (Aug. 25, 2011) (transcript available at <http://thedianerehmshow.org/shows/2011-08-25/conflict-interest-supreme-court/transcript>).

quite mysterious.¹⁵³ Critics argue that the lack of transparency undermines the very purpose of the recusal statute, which is to promote public confidence in impartiality of the judiciary.¹⁵⁴

Critics want the Justices to issue written statements explaining their reasons when they recuse themselves, both *sua sponte* and in response to a party motion, and their reasons when they refuse to recuse themselves¹⁵⁵ because “[i]t is essential to have a public enunciation of the standards by which the Court reaches its decisions.”¹⁵⁶ Written explanations would ensure the Justices are “abid[ing] by the rule of law and not political influence or ideology.”¹⁵⁷ Written explanations would also provide people “something real and concrete” from which they can assess whether justice is being achieved, rather than forcing people to resort to guesswork.¹⁵⁸ Finally, written explanations would lay the foundation for when recusal is appropriate and facilitate consistent decisions in later cases presenting similar circumstances.¹⁵⁹

There are some problems, however, with the suggestion that Supreme Court Justices publicly disclose why they have recused, or refused to recuse, themselves. First, requiring Justices to provide an explanation each time they recuse or refuse to recuse far exceeds the public’s need to know. Justices are subjected to a public Senate confirmation process in which their personal and professional backgrounds are examined.¹⁶⁰ They are subjected to continuing mandatory financial disclosures, which are publicly available.¹⁶¹ Supreme Court Justices are highly visible public figures so it is easy to track their appearances at events and find out what they might have said. Therefore, requiring Justices to provide the public with information beyond the vast amount that is already publicly available is a nuisance. It is also intrusive because the reasons on which the Justice’s recusal decision is based could be highly personal or of a sensitive nature, and the Justice’s privacy, or another person’s privacy, might need to be protected.¹⁶² The Justices’ right to maintain

153. Liptak, *supra* note 99, at A18; *see also* Tony Mauro, *Decoding High Court Recusals*, LEGAL TIMES, Mar. 1, 2004, at 1 (referring to the “murky world of Supreme Court recusals”).

154. Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 11 (2007).

155. *See, e.g.*, H.R. 862, 112th Cong. (2011).

156. Roberts, *supra* note 97, at 169–70.

157. Letter from Rep. Christopher Murphy, *supra* note 6.

158. Cravens, *supra* note 154, at 5.

159. Goodson, *supra* note 98, at 216.

160. *See* CHIEF JUSTICE ROBERTS, *supra* note 82, at 10; *see generally*, BETSY PALMER, CONG. RESEARCH SERV., RL 31948, EVOLUTION OF THE SENATE’S ROLE IN THE NOMINATION AND CONFIRMATION PROCESS: A BRIEF HISTORY (2008) (describing the history of the Senate’s role in the confirmation process and the importance of the Senate’s role in evaluating the candidates).

161. 5 U.S.C. Appx. §§ 101–02 (2000).

162. Kozinski, *supra* note 45, at 1104–05; Cravens, *supra* note 154, at 45.

a modicum of privacy outweighs the benefits of satisfying the public's curiosity and establishing precedent.

Second, the information provided in the written explanations will undoubtedly be monitored by interest groups looking to use disqualification as a weapon to shape the outcome of litigation.¹⁶³ However, even if the written explanations are only used for the benevolent purpose of protecting the integrity of the Court by assuring the judicial process is impartial, the increased knowledge of the recusal process provided by the written explanations will bring increased requests for recusal and an increased workload for the Justices. If we want the Court to be efficient, we cannot expect the Justices to explain everything they do.

The biggest problem with written explanations, however, is that while they sound good in theory, they will be counter-productive in reality, and public confidence in the Court will actually decrease. The typical, reasonable citizen has only a rudimentary understanding of the mechanics and realities of the judicial system in general, much less of the Supreme Court.¹⁶⁴ They question the impartiality of the Justices without considering the wide range of factors the recusal standard seeks to balance.¹⁶⁵ Additionally, "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges."¹⁶⁶ As a result, there is a tension between when people expect Justices to recuse themselves because of an appearance of potential bias, and when the standard actually calls for recusal.¹⁶⁷

For example, a typical, reasonable citizen might worry that a Justice who knows the parties, government officials, or lawyers in front of the Court cannot be impartial. However, throughout their careers, judges acquire friends, former colleagues, and former law clerks. Supreme Court Justices, in particular, "hold the type of credentials that create even more ties over the course of [their] career such that it would not be unusual to expect connections between the Justice and the players (both the parties and the law firms) who appear before the Supreme Court."¹⁶⁸ In fact, many of the elite attorneys who appear in the

163. See *infra* notes 201–11 and accompanying text.

164. Cravens, *supra* note 154, at 20 (describing a concern regarding the assumptions of those unfamiliar with the judicial system).

165. *Hearing*, *supra* note 101, at 56 (statement of Eugene Volokh, Prof. of Law, U.C.L.A.). Minimizing improper influences on judicial decision-making is not the only goal of the legal system. *Id.* The legal system also wants final decisions without recusals that leave the Court split four to four. *Id.* The legal system wants to appoint high-quality judges to sit in the place in which they are from. *Id.* The legal system does not want to unduly handicap judges' families in their own professional lives and it wants judges to be free to continue their social lives and financial lives. *Id.*

166. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864–65 (1988).

167. *Hearing*, *supra* note 101, at 57 (statement of Eugene Volokh, Prof. of Law, U.C.L.A.).

168. *Roberts*, *supra* note 97, at 153.

Supreme Court have clerked for the very Justices before whom they are arguing.¹⁶⁹ Additionally, Justice Scalia noted the “well-known and constant practice of Justices’ [sic] enjoying friendship and social intercourse with Members of Congress and officers of the Executive Branch”¹⁷⁰ He also freely admitted that “many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials”¹⁷¹ Contrary to what the public may think, the connections between the Justices and the parties and attorneys who appear in front of the Court are not at odds with goals of the legal system. It is important that judges continue their social lives after being appointed to the bench so they are “sufficiently personally involved in their societies and communities so that they can understand the experiences of those before them, [and] understand the real life ramifications of their decisions”¹⁷²

Another example is a typical, reasonable citizen might worry that a Justice who has opinions and has made past statements about controversial issues cannot be impartial when those issue comes before the Court. However, in the case of Supreme Court Justices, the absence of opinions or comments is more illustrative of indifference and a lack of qualification, than a lack of bias.¹⁷³ Most Justices are middle-aged before they are appointed to the Supreme Court.¹⁷⁴ They are “strong-minded” men and women.¹⁷⁵ It would be “not merely unusual, but extraordinary” if Justices had not formulated notions or expressed opinions regarding constitutional issues they had encountered prior to taking the bench.¹⁷⁶ As one commentator said, “[W]e should not so highly

169. *Hearing*, *supra* note 101, at 51 (statement of Eugene Volokh, Prof. of Law, U.C.L.A.).

170. *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 926 (2004).

171. *Id.* at 916. The relationships between Supreme Court Justices and high-ranking government officials have existed since the beginning of our Nation. Chief Justice John Marshall, Justices Thomas Johnson, Joseph Story, and Thomas Todd, Attorney General William Wirt, and famed constitutional attorney, Daniel Webster, were guests at President John Quincy Adams’ dinner parties. *Id.* Justice John Marshall Harlan and his wife spent Sunday evenings at the White House with President Rutherford B. Hayes and his family. *Id.* at 917. Justice William Douglas played poker with President Franklin Roosevelt and Chief Justice Fred Vinson did the same with President Harry Truman. *Id.* Justice Oliver Wendell Holmes and his wife went to dinner every week or two at the White House with President Theodore Roosevelt. *Id.* Justice Byron White went on a family vacation skiing in Colorado with Attorney General Robert Kennedy and Secretary of Defense Robert McNamara. *Id.* at 924. Justice Robert Jackson was a close friend of Franklin Roosevelt’s and frequently socialized and vacationed with the President. *Id.* at 925–26.

172. Cravens, *supra* note 154, at 30.

173. *Laird v. Tatum*, 409 U.S. 824, 835 (1972).

174. *Id.*

175. *Id.* at 836 (quoting John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 48 (1970)).

176. *Laird*, 409 U.S. at 835.

value the appearance (or even the reality) of impartiality that we would require a judge to come to the bench as a blank slate.”¹⁷⁷

A third example is that a typical, reasonable citizen might worry that a Justice whose spouse has publicly spoken about an issue before the Court cannot be impartial. For example, Virginia Thomas is a very vocal opponent of the Obama administration’s health care reform law, and many observers wondered if Justice Thomas could be impartial when the case, which means so much to his wife, was challenged before the Supreme Court.¹⁷⁸ However, we do not want Justices’ families to be unduly handicapped in their own professional lives.¹⁷⁹ As such, federal law does not bar a Justice from participating in any matter in which their family members have an ideological interest.¹⁸⁰ Stephen Gillers, one of the nation’s leading ethics experts, explained, “[a] spouse of a judge can have a full political life and take positions on political issues and legal issues, even ones that come before his or her spouse.”¹⁸¹ Steven Lubet, an ethics professor at Northwestern Law School, agreed and stated, “two-career families are now the norm and there are no constraints on the political activities of judicial spouses.”¹⁸² David Garrow, a historian at Cambridge University, added that in a democracy, Virginia Thomas’s public comments are “utterly proper,” if not “utterly commendable.”¹⁸³ Justice Thomas also received support from a former colleague; retired Justice John Paul Stevens stated “I wouldn’t think there’s any possibility that any of the activities of Mrs. Thomas have had any impact on the analysis of Judge Thomas.”¹⁸⁴

A final example is that a typical, reasonable citizen might worry that a Justice who has been publicly insulted and harshly criticized by an individual cannot be impartial when that individual comes before the Court. “After all, judges are human beings who may take umbrage at that and may end up holding it against the person.”¹⁸⁵ However, Canon 14 of the original 1924 Canons of Judicial Ethics provides that a judge “should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.”¹⁸⁶ We cannot have a system in which criticism leads to automatic recusal because then “people can just

177. Cravens, *supra* note 154, at 30.

178. Lubet, *supra* note 32.

179. *Hearing*, *supra* note 101, at 56 (statement of Eugene Volokh, Prof. of Law, U.C.L.A.).

180. Totenberg, *supra* note 7.

181. *Id.*

182. Jackie Calmes, *Activism by Thomas’s Wife Could Raise Judicial Issues*, N.Y. TIMES, Oct. 9, 2010, at A14.

183. Lisa Miller, *Sweet Virginia*, NEWSWEEK, Oct. 8, 2010, at 37.

184. Barnes, *supra* note 23, at A16.

185. *Hearing*, *supra* note 101, at 51 (statement of Eugene Volokh, Prof. of Law, U.C.L.A.).

186. CHIEF JUSTICE ROBERTS, *supra* note 82, at 10.

judge-shop simply by insulting enough judges.”¹⁸⁷ Similarly, we cannot have a system where the media is given “a veto over participation of any Justices.”¹⁸⁸ First, the media “may not be an accurate proxy for public opinion.”¹⁸⁹ Second, the media also tends to generate a controversy where none exists.¹⁹⁰ Recusals based on criticisms and clamoring by individuals and the media would only “encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons.”¹⁹¹ Therefore, as Chief Justice Roberts explained in his Year End Report, “Such concerns have no role to play in deciding a question of recusal.”¹⁹²

The previous four examples illustrate the discrepancy between the expectations of typical, reasonable citizens and the realities of the legal system. Written explanations will lead to less confidence in the Court, rather than more, when people expect a Justice to recuse him or herself and become confused, disappointed, or outraged when it turns out the standard doesn’t call for recusal.¹⁹³ Written explanations will lead to less confidence in the Court when the public realizes the recusal statute is not clear cut¹⁹⁴ and each Justice is left to personally decide “(a) what evidence of ‘impartiality’ is enough to trigger recusal, (b) whose ‘questioning’ of the judge’s impartiality is to be taken into account, and (c) when such questioning is deemed to be ‘reasonable.’”¹⁹⁵

III. THE RECUSAL PROCESS IS NOT BROKEN, SO QUIT TRYING TO FIX IT

The Supreme Court recusal process is certainly not perfect, but revising it is not necessary at this point despite public clamoring to the contrary. It is a manufactured crisis. Demands that Justice Kagan and Justice Thomas recuse

187. *Hearing*, *supra* note 101, at 51 (statement of Eugene Volokh, Prof. of Law, U.C.L.A.).

188. *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 927 (2004).

189. *Frost*, *supra* note 10, at 534.

190. *Id.* at 577. For example, following a 2011 committee hearing, when Rep. Jose Serrano asked Justices Kennedy and Breyer to share their thoughts on the fact that the Code of Ethics is not binding on the Supreme Court, the media surmised that Supreme Court Justices do not apply the Code. *Budget Hearing Before the Subcomm. On Fin. Serv. and General Gov’t of the H. Comm. on Appropriations*, 112th Cong. (2011) (statement of H. Rep. Jose E. Serrano), available at <http://appropriations.house.gov/Calendar/EventSingle.aspx?EventID=>; see *No Court Should be Above the Rules*, ALLIANCE FOR JUSTICE, <http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/> (stating that the Code “shockingly” does not apply to the Justices) (last visited Aug. 31, 2012). But in reality, the Justices do apply the Code and it “plays the same role for the Justices as it does for other federal judges.” CHIEF JUSTICE ROBERTS, *supra* note 82, at 4.

191. *Cheney*, 541 U.S. at 927.

192. CHIEF JUSTICE ROBERTS, *supra* note 82, at 10.

193. *Hearing*, *supra* note 101, at 57 (statement of Eugene Volokh, Prof. of Law, U.C.L.A.).

194. *Cravens*, *supra* note 154, at 6–8 (explaining that the recusal statute does not sufficiently explain its terms and is “vague at best” in its guidance).

195. *Denniston*, *supra* note 20.

themselves from deciding the constitutionality of the Affordable Care Act were not made to protect the integrity of the Court,¹⁹⁶ they were partisan attempts to gain an advantage when the Affordable Care Act came before the Court. Nonetheless, the demands triggered a general fear that the Supreme Court recusal process is broken and in need of repair. The reality, however, is that the recusal process has served our country well for over 200 years.¹⁹⁷ As Chief Justice Roberts noted in his Year End Report, “[t]hroughout our Nation’s history, instances of judges abandoning their oath ‘to faithfully and impartially discharge and perform’ the duties of their office have been exceedingly rare.”¹⁹⁸

Health care reform is a politically polarizing issue. Democratic presidents since Harry Truman have tried and failed to pass health care reform.¹⁹⁹ After a year of bitter partisan combat, President Obama was finally able to do so in 2010.²⁰⁰ It has long been acknowledged that parties may question a Justice’s impartiality in an attempt to avoid the judge’s adverse decision.²⁰¹ In politically charged cases when a party moves to recuse a judge, the odds are that the party is not simply civic-minded and trying to ensure the judicial process is fair; the party is trying to shape the legal outcome.²⁰² Typically Supreme Court cases, particularly those related to abortion, homosexuality, and affirmative action, are very politically charged.²⁰³ The stakes are high, the impact is broad, the issues are divisive, and the decisions often turn on the vote of a single Justice.²⁰⁴ In these cases, “you can come up with an accusation of

196. The Supreme Court is not concerned with the demands. See Adam Liptak, *Chief Justice Defends Peers on Health Law*, N.Y. TIMES (Jan. 1, 2012), at 1, 22 (explaining Kagan and Thomas have not crossed an ethical line requiring recusal and suggesting Chief Justice Roberts defended Kagan and Thomas in his 2011 Year End Report).

197. See generally Totenberg, *supra* note 7 (explaining that our country’s recusal process has been in place for as long as there has been a Supreme Court).

198. CHIEF JUSTICE ROBERTS, *supra* note 82, at 11.

199. Jonathan Oberlander, *Long Time Coming: Why Health Reform Finally Passed*, 29 HEALTH AFF. 1112, 1112 (2010).

200. *Id.*

201. H.R. REP. NO. 93-1453, at 4 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355.

202. Denniston, *supra* note 20.

203. *The Diane Rehm Show*, *supra* note 152 (describing the politically charged atmosphere of Supreme Court cases).

204. Letter from Law Professors, *supra* note 41. In 1992, in *Planned Parenthood v. Casey*, the U.S. Supreme Court ruled 5-4 and affirmed a woman’s right to an abortion, but broadened the states’ authority to regulate it. 505 U.S. 833 (1992). In 2000, the U.S. Supreme Court decided *Bush v. Gore* by a vote of 5-4 and essentially determined the outcome of the presidential race. 531 U.S. 98 (2000). *Citizens United v. Federal Elections Commission* was one of the most high-profile cases of the 2009 term and the Court ruled 5-4, striking down limits on corporate and union spending on political campaigns. 130 S.Ct. 876 (2010). Partial birth abortion cases, *Stenberg v. Carhart* in 2000 and *Gonzales v. Carhart* in 2007 were each decided by a vote of 5-4. 530 U.S. 914 (2000); 550 U.S. 124 (2007). In 2003, in *Grutter v. Bollinger*, the U.S. Supreme

political conflict in almost any of them.”²⁰⁵ Justices often are close friends, or at the very least socialize, with high-ranking government officials.²⁰⁶ Justices are aligned with either the Democratic or Republican Party and each president tries to appoint individuals to the Court whose views on key issues are consistent with his own.²⁰⁷ And before coming to the bench, Justices have typically made public comments regarding their stance on constitutional interpretation and issues facing the nation.²⁰⁸

The demands for Justices Kagan and Thomas to disqualify themselves from hearing the challenges to the Affordable Care Act were likely attempts to gain an advantage in the litigation.²⁰⁹ “Criticism on ethics issues is often a proxy for political disapproval with how you expect a justice to vote.”²¹⁰ In this case, the political right presumed that Justice Elena Kagan would vote in favor of the law and called for her recusal, hoping to improve the possibility that the law would fail.²¹¹ Her critics accused her of being too biased to hear the health care case, claiming that as Solicitor General, Kagan strategized about the law, advised the Obama administration on the law, and also expressed opinions on its constitutional merits in violation of the recusal rules.²¹² The political left, on the other hand, presumed that Justice Clarence Thomas would vote to strike down the law, and called for his recusal, hoping to improve the chances the law would be upheld.²¹³ His critics accused him of being too biased to hear the health care case because his wife spent significant time and effort, and earned a great deal of money, lobbying against the law.²¹⁴ Both sides of the argument knew the Court’s overall credibility was in play and

Court ruled 5-4 in favor of the University of Michigan Law School’s use of race in considering admissions. 539 U.S. 306 (2003).

205. *The Diane Rehm Show*, *supra* note 152.

206. See *supra* notes 170–71 and accompanying text.

207. Does the Supreme Court Follow the People?, *supra* note 4, at 24–25. For example, Abraham Lincoln appointed Salmon P. Chase, a committed abolitionist, to replace Chief Justice Roger Brooke Taney, the author of the *Dred Scott* decision. Paul Finkelman, *You Can’t Always Get What You Want . . . : Presidential Elections and Supreme Court Appointments*, 35 TULSA L.J. 473, 479 (2000). Franklin Delano Roosevelt threatened to “pack” the Supreme Court with Justices who agreed with his New Deal politics. Samuel R. Olken, *Historical Revisionism and Constitutional Change: Understanding the New Deal Court*, 88 VA. L. REV. 265, 266–67 (2002) (reviewing G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000)).

208. See *supra* notes 174–76 and accompanying text.

209. *The Diane Rehm Show*, *supra* note 152.

210. Totenberg, *supra* note 7.

211. Denniston, *supra* note 20. Interestingly, if Kagan was still serving as Solicitor General, she would have defended the Affordable Care Act to the Supreme Court rather than decide its constitutionality. Barnes, *supra* note 23, at A1.

212. Barnes, *supra* note 23, at A16.

213. Denniston, *supra* note 20.

214. *Id.*

accusing Justices of being unethical can be politically powerful and undermine the credibility of the Court's decision.²¹⁵

There are many critics who argue that the calls for Justice Kagan's and Justice Thomas' recusals are indicative of a much larger concern about the effectiveness of the recusal process generally. However, there is very little evidence that bias on the Supreme Court is a problem. First, Supreme Court Justices are well qualified to hold their positions and committed to their duties. "They are jurists of exceptional integrity and experience."²¹⁶ They have been subjected to a "rigorous appointment and confirmation process,"²¹⁷ which tested their character and ensured they were fit to hold a lifetime appointment to the Court. While on the Court, the Justices continue to follow high ethical standards and are "deeply committed to the common interest in preserving the Court's vital role as an impartial tribunal governed by the rule of law."²¹⁸ Professor Charles Geyh explained to the House Committee on the Judiciary that "it is extremely rare . . . for a judge to willfully refuse to disqualify himself under circumstances in which the judge knows he must. On the whole . . . our judges are too committed to impartial justice for any but the isolated bad apple to do that . . ."²¹⁹ Bias has not historically been a problem on the Court,²²⁰ and it seems unlikely it will become a problem in the near future. As Harvard law professor and Supreme Court historian Noah Feldman said, "Today, with information moving as fast as it does, it would be very difficult for any justice to hide any improprieties . . ."²²¹

Critics of the recusal process have cited declining Supreme Court approval ratings as evidence the process is broken. Since 2000, public approval "of the way the Supreme Court handles its job" has fluctuated between a high of sixty-two percent and a low of forty-two percent.²²² The fluctuation, however, is not because of concern about possible ethical transgressions by the Justices, but is better explained by broad national discontent and disagreement with politically controversial decisions by the Court.²²³ For example, in 2003, after the

215. Totenberg, *supra* note 7.

216. CHIEF JUSTICE ROBERTS, *supra* note 82, at 10.

217. *Id.*

218. *Id.*

219. *Hearing*, *supra* note 101, at 21 (statement of Charles G. Geyh, Assoc. Dean of Research, Prof. of Law, Ind. Univ.).

220. CHIEF JUSTICE ROBERTS, *supra* note 82, at 11.

221. Totenberg, *supra* note 7.

222. See Jeffrey M. Jones, *Supreme Court Approval Rating Dips to 46%*, GALLUP (Oct. 3, 2011), <http://www.gallup.com/poll/149906/supreme-court-approval-rating-dips.aspx>.

223. Benjamin Wittes, *The Supreme Court's Looming Legitimacy Crisis*, BROOKINGS INST. (June 25, 2007), http://www.brookings.edu/opinions/2007/0625governance_wittes.aspx; Jones, *supra* note 222.

Supreme Court struck down a Texas law making homosexual sex a crime,²²⁴ and upheld the affirmative action admissions policy at the University of Michigan Law School, approval ratings dipped from sixty percent to fifty-two percent.²²⁵ The Court's approval rating continued to fall in 2005 to an all-time low of forty-two percent after decisions involving eminent domain,²²⁶ medical marijuana,²²⁷ and government displays of religious symbols.²²⁸ After a brief recovery in 2006, the Supreme Court's approval ratings dipped again in 2007 and 2008 to around fifty percent.²²⁹ These lower ratings were attributed to both a broad decline in public confidence in the Congress, the President, the press, labor unions, the medical system, and the criminal justice system,²³⁰ and the Court's controversial ruling upholding the federal law that banned partial-birth abortion.²³¹

The Supreme Court began its 2011-2012 term with an approval rating of forty-two percent, the second lowest recorded rating.²³² In keeping with the trend, this low rating has been explained by both a controversial, political decision by the Court and broad national discontent. The Supreme Court's approval rating has been declining since its *Citizens United* decision in January 2010,²³³ and the ratings have been unable to rebound amidst "profound cynicism about our capitalist democracy" and acutely polarized politics.²³⁴ The nation has been at war for over a decade.²³⁵ Thirteen million Americans are unemployed.²³⁶ Four million Americans have lost their homes to foreclosure,

224. *Lawrence v. Texas*, 539 U.S. 558 (2003).

225. *Grutter v. Bollinger*, 539 U.S. 306 (2003); Jeffrey M. Jones, *Supreme Court Approval Rating Best in Four Years*, GALLUP (Sept. 29, 2006), <http://www.gallup.com/poll/24802/supreme-court-approval-rating-best-four-years.aspx>.

226. *Kelo v. New London*, 545 U.S. 469 (2005).

227. *Gonzales v. Raich*, 545 U.S. 1 (2005).

228. *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005); see Jeffrey M. Jones, *Public Gives Supreme Court Passing Grade*, GALLUP (Oct. 3, 2008), <http://www.gallup.com/poll/110965/Public-Gives-Supreme-Court-Passing-Grade.aspx>.

229. Jones, *supra* note 222.

230. Wittes, *supra* note 223.

231. *Gonzales v. Carhart*, 550 U.S. 124 (2007); Joseph Carroll, *Slim Majority of Americans Approve of the Supreme Court*, GALLUP (Sept. 26, 2007), <http://www.gallup.com/poll/28798/Slim-Majority-Americans-Approve-Supreme-Court.aspx>.

232. Jones, *supra* note 222.

233. See *id.* (depicting a relatively sudden and drastic decline in the Supreme Court's approval rating between early 2010 and late 2011).

234. Dan Rodricks, *Justice Breyer, the Supreme Explainer*, THE BALTIMORE SUN (Oct. 12, 2011), http://articles.baltimoresun.com/2011-10-12/news/bs-ed-rodricks-breyer-20111012_1_justice-breyer-supreme-court-judicial-oath.

235. Rick Hampton, *Afghanistan: America's Longest War*, USA TODAY (May 28, 2010), http://www.usatoday.com/news/military/2010-05-27-longest-war-afghanistan_N.htm.

236. Editorial, *The State of the Union in 2012*, N.Y. TIMES, Jan. 25, 2012, at A28.

and home prices have continued to drop significantly in the last five years²³⁷ in what has been the biggest housing slump since the Great Depression.²³⁸ Congress is universally deplored: on average in 2011, only seventeen percent of Americans approved of the way Congress handled its job, including a low of eleven percent in December 2011.²³⁹ President Obama's approval ratings have been consistently among the most polarized for a president in the last sixty years.²⁴⁰ An average of eighty percent of Democrats approved of the job he was doing in 2011, while only twelve percent of Republicans approved.²⁴¹

The roots of current criticisms of the Supreme Court recusal process are political posturing, an uneasy nation, and controversial decisions by the Court, not evidence of an actual problem of bias. Therefore, the recusal process should be left alone. It has been used for two centuries through social revolutions, political unrest, times of war, and times of prosperity. And the changes being advocated would fundamentally change the Supreme Court as an institution. As Russell Wheeler of the Brookings' Institute stated: "This may just be a situation we live with because any cure is worse than what we have now."²⁴²

CONCLUSION

The issue of recusal is extremely important because a fair and impartial judge is essential to the American notion of justice. While Supreme Court Justices have always determined for themselves whether or not to recuse, and their decisions are not reviewable, criticisms of this process have recently saturated the news. The criticisms, however, are misguided and based on misunderstandings about Supreme Court Justices. These critics seem to ignore the historical evidence as the recusal process has been used for over two centuries and has served our country well. The critics also fail to consider that "impartiality and diligence are obligations that permeate every aspect of judicial life—obligations that each [Justice] has the unflagging responsibility

237. Lee Christie, *Foreclosures Fall to Lowest Level Since 2007*, CNN MONEY (Jan. 12, 2012), http://money.cnn.com/2012/01/12/real_estate/foreclosures/index.htm; Press Release, S&P Indices, Home Prices Continue to Decline in November 2011 According to the S&P/Case-Shiller Home Price Indices (Jan. 31, 2012), available at http://www.standardandpoors.com/spf/docs/case-shiller/CSHomePrice_Release_013118.pdf.

238. Nelson D. Schwartz & Shaila Dewan, *\$26 Billion Deal is Said to be Set for Homeowners*, N.Y. TIMES, Feb. 9, 2012, at A1.

239. Frank Newport, *Congress' Job Approval at New Low of 10%*, GALLUP (Feb. 8, 2012), <http://www.gallup.com/poll/152528/Congress-Job-Approval-New-Low.aspx>.

240. Jeffrey M. Jones, *Obama Ratings Historically Polarized*, GALLUP (Jan. 27, 2012), <http://www.gallup.com/poll/152222/Obama-Ratings-Historically-Polarized.aspx>.

241. *Id.*

242. Totenberg, *supra* note 7.

to police for himself.”²⁴³ They downplay that Justice Kagan and Justice Thomas are the latest targets of “the Washington obsession with turning substantive disagreements into supposed ethical transgressions” in an attempt to shape the Court’s decision on the constitutionality of the health care reform law.²⁴⁴ And they do not acknowledge that Americans are unhappy with *everything* these days.

Is the recusal process perfect? No. But neither are the proposed solutions. Creating a review process for Supreme Court recusal decisions would require the Justices to sit in judgment of one another, or worse yet, involve violating the Constitutional mandate of “one supreme Court.” Further, requiring the Justices to issue written explanations for their recusal decisions would be intrusive, burdensome, and counter-productive. Justice Scalia said it best when he told the Senate Committee on the Judiciary, “I think we can stumble along the way we are.”²⁴⁵

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243. Kozinski, *supra* note 45, at 1106.

244. *The Diane Rehm Show*, *supra* note 152.

245. *Considering the Role of Judges Under the Constitution of the United States Before the S. Comm. on the Judiciary*, 112th Cong. 29 (2011) (statement of J. Antonin Scalia).

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